No. 03-18-00153-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS

TEXAS DEPARTMENT OF TRANSPORTATION
Appellant

v.

ALBERT LARA, JR.
Appellee

On appeal from the 353rd District Court
of Travis County, Texas
Cause No. D-1-GN-16-005836;
Honorable Jan Soifer, Presiding

APPELLEE'S BRIEF

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would materially aid the Court in addressing the scope and applicability of the Texas Labor Code's protections afforded to employees under Texas law. Oral argument would allow further analysis of these statutory protections, significant to Texas employees and the jurisprudence of this Court. Additionally, Lara's counsel requests oral argument in furtherance of meeting the requirements for board certification.

ISSUES PRESENTED

I. Did the trial court properly conclude that Lara raised a fact issue on his failure to accommodate claim where Lara told TxDOT of his disability and limitations, and requested reasonable accommodation (medical leave), but TxDOT fired him instead?

II. Did the trial court properly conclude that Lara raised a fact issue on his disability discrimination claim where Lara was legally qualified for his job and TxDOT fired him because of his disability?

III. Did the trial court properly conclude that Lara raised a fact issue on his retaliation claim where TxDOT fired Lara for engaging in a protected activity (requesting leave)?

IV. Is TxDOT's alleged nondiscriminatory reason for Lara's termination properly before this court where TxDOT failed to raise it in its briefing, and if so, did Lara raise a fact issue about pretext?

STATEMENT OF FACTS

A. Lara is a twenty-one-year employee of TxDOT.

Albert Lara, Jr., (Lara) began work at the Texas Department of Transportation (TxDOT) in 1994. C.R. 435. Lara worked as a General Engineering Technician in TxDOT's Milam County office. C.R. 435-437. His primary responsibility involved inspections to make sure TxDOT contractors properly performed under their contracts (such as mowing, litter pick up, guardrail repair) *Id.* During his 21-year employment Lara never received any type of discipline. *Id.* On the last evaluation of his performance he reached an "exceeds expectations" rating—the highest rating a TxDOT employee can achieve. *Id.*

B. Lara undergoes surgery.

In late April 2015, Lara experienced severe abdominal pain and was hospitalized. C.R. 436. He underwent major colon, intestine, and bladder surgery on May 7. *Id.* Upon discharge from the hospital on May 12 Lara was extremely sore, and had a surgically-attached colostomy bag, 12-inch incision in his abdomen, catheter, and several drains. *Id.* The large wounds needed time to heal. *Id.* Home health care workers came to Lara's house 3-4 times per week in the beginning to

check liquid in his catheter and clean and dump it; check drains and clean them; and remove the wound vac and clean it. *Id.* By September 2015 home health care workers came to the house about once a week. *Id.*

C. Lara communicates with TxDOT about his condition.

In May 2015 Lara spoke with his supervisor, Brad Powell, about his job and his medical condition. *Id.* Lara asked Powell about returning to work on light duty, but Powell informed him no light duty work was available for Lara. *Id*; 368.

TxDOT has a temporary modified duty policy and has granted employees temporary modified duties in the past, all of which Powell knew. C.R. 377. Yet Powell told Lara he must be released 100% to full duty before returning to work. C.R. 436. Lara communicated this requirement to his physician, which is why his physician stated on all paperwork that Lara was unable to do any type of light duty work. C.R. 436-437; 469-474; 391.

Lara and his physician provided TxDOT with updates on his condition and his anticipated return to work date. C.R. 436-37. Lara communicated mainly with Assistant Supervisor Robert Talafuse and office manager Jennifer Trowbridge in the Cameron office when he was

on medical leave; they would relay these conversations to Powell. C.R. 369. Lara received a letter from TxDOT dated July 10, informing him that his FML leave would be exhausted on July 15. C.R. 436-437. The letter also said Lara could request more leave with his physician completing the paperwork attached to the letter. *Id.*

Lara had his physician complete the paperwork. *Id.*[1] The physician faxed TxDOT completed paperwork on July 15, informing TxDOT that (1) Lara had a large surgical wound and a healing colostomy wound, (2) the wounds limited his physical activities, (3) he was unable to perform the essential functions of his job which included "heavy lifting, straining, stooping," (4) the wound needed to heal before return to work, and (5) Lara should be able to return to work without restrictions on October 21, 2015. C.R. 436-437; 469-474. The purpose of these forms was "to share medical facts and the amount of leave needed." C.R. 391.

[1] The forms included: (1) TxDOT Form 2555 entitled "Extended Sick Leave / Sick Leave Pool Request Form," in which Lara requested time away from work. C.R. 413; and (2) TxDOT Form 2556, entitled "Extended Sick Leave / Sick Leave Pool Certification," given to Lara's health care provider to verify Lara needs medical leave from work. C.R. 414.

D. Lara seeks assistance from TxDOT to keep his job.

On August 18, Lara, at home recovering under his physician's orders, spoke by phone with office manager Jennifer Trowbridge and also assistant supervisor Robert Talafuse. C.R. 436-437. Lara sought assistance from Trowbridge and Talafuse on what he needed to do to make sure he kept his job given his medical condition and limitations which required him to be off work at that time. *Id.* The two explained to Lara that there would be no paid leave beyond September 16; it would be leave without pay (LWOP) after that. *Id.* Trowbridge and Talafuse told Lara that Lance Simmons, District Engineer, would decide whether Lara received LWOP. *Id.*

E. TxDOT knows about Lara's condition and does nothing.

On August 19, Brad Powell e-mailed Lance Simmons and Elizabeth Holick, lead HR Specialist, informing them Lara had been off work from "major surgery" since May 2015 and that Lara was asking about his future with TxDOT. C.R. 370-371; 444.

Powell knew that Lara had parts of his colon removed, had a colostomy bag, and had a physical impairment that limited his ability to work. C.R. 373. Powell knew that Lara was worried about his sick leave

ending September 16. C.R. 370-371. Powell knew that Lara wanted to remain an employee of TxDOT after that time. C.R. 370-371. And Powell knew that Lara's physicians said Lara could return to work on October 21. *Id.*

Powell knew that under TxDOT's policy an employee's supervisor can initiate the accommodation process when he learns of such things. C.R. 374; C.R. 423 (HR Specialist Holick knew this as well). Powell knew he could have initiated a process to provide LWOP as a reasonable accommodation for Lara's disability. C.R. 374; C.R. 423. Powell knew all of this and did nothing to provide an accommodation to Lara until his return. *Id.*

In fact, no one at TxDOT did anything to provide an accommodation to Lara. District Engineer, Lance Simmons knew that through the medical forms Lara communicated a need for extended sick leave. C.R. 291. Despite this knowledge, Simmons never spoke with Lara about an accommodation for Lara. C.R. 393-394.

HR Specialist Holick knew about the medical paperwork that showed that Lara was unable to work because of his physical limitations and the wound needed to heal before Lara could return on October 21.

C.R. 413-414. Holick knew from this medical paperwork that Lara was asking for medical leave and that Lara's doctor said Lara would be able to return to work on October 21. C.R. 414. Despite this knowledge, she did nothing. C.R. 423. Neither Elizabeth Holick nor anyone in HR contacted Lara to engage in a dialogue about an accommodation. *Id.*

F. TxDOT fires Lara.

On September 1, Lance Simmons made the decision to fire Lara. C.R. 392; 395; 422; 377. Simmons knew that under TxDOT's policy if an employee requires unpaid leave as a reasonable accommodation for a disability the LWOP policy *requires* Simmons to grant leave to that employee. C.R. 396-397; 427. Simmons and Holick discussed the policy for accommodating individuals with disabilities before terminating Lara. C.R. 397.

Simmons knew about Lara's expected return to work date of October 21, when he discussed Lara's future with TxDOT on September 1. C.R. 395. Simmons knew about TxDOT's policy that supervisors initiate the reasonable accommodation process when they learn of an employee with a disability and the possible need for an

accommodation. C.R. 398. And Simmons knew that at the time of termination that Lara could return to work on October 21. *Id.*

Simmons admitted that TxDOT did not grant Lara any unpaid leave and instead fired him. C.R. 397. Simmons testified that the September 9, 2015, letter to Lara ending his employment contained all the reasons for Lara's termination. C.R. 399. Although, TxDOT later claimed that Lara's potential need for future medical treatment factored into its decision to terminate. C.R. 169-170.

G. TxDOT's business needs excuse.

Simmons stated that TxDOT fired Lara because TxDOT "had a real business need for his duties," and that "he wasn't able to perform his duties" "due to his limitations" in that "[h]e was recovering." C.R. 392-393. The evidence during the same time, however, shows that TxDOT had numerous options to cover Lara's responsibilities during his absence. C.R. 435-437;439-440; 369; 399-400 479-486. Despite various options available to the *massive* state agency, with 11,000 employees, TxDOT did not deem it necessary to pursue any of them to cover Lara's work. C.R. 376-377; 435-436; 439-440; 479-486.

Additionally, at no point during any of Lara's conversations from May to September 2015 did the folks in the Milam County office ever tell Lara that his absence was causing problems or that work was not getting covered. C.R. 437. It was only after TxDOT decided to fire Lara that it mentioned, for the first time to Lara, this excuse. *Id.*

SUMMARY OF THE ARGUMENT

This case is about the firing of a hard-working employee because he needed medical leave. Albert Lara, Jr. was a good, dependable worker for more than two decades. In April 2015, Lara experienced severe abdominal pain. And on May 7, he underwent major colon, intestine, and bladder surgery. Lara communicated often with his supervisors at TxDOT about keeping his job. TxDOT knew about Lara's condition, limitations, and expected return date, October 21.

Despite twenty-one years of reliable work, when Lara asked for time to heal before he returned to work, TxDOT let him down. TxDOT fired Lara while he was recovering from surgery, despite knowing Lara intended to return just a month later.

Lara sued TxDOT for failure to accommodate, disability discrimination, and retaliation. TxDOT filed a plea to the jurisdiction arguing that Lara could not establish a prima facie case of his claims. The issue on appeal is simply whether Lara presented adequate evidence to establish a fact issue on the prima facie elements of his claims. The answer is yes. The trial court properly denied TxDOT's Motion for three reasons.

First, the record is clear: TxDOT knew about Lara's major surgery, resulting limitations, and expected return date, October 21. TxDOT knew all of this, and rather than allow for medical leave for Lara to heal, TxDOT fired him. These inescapable facts carry the day. They raise a fact issue on the prima facie elements of each of Lara's claims.

Second, TxDOT's legal arguments to avoid liability are unavailing. To avoid the facts, TxDOT tries to create several dubious rules of law. A medical provider cannot, as a matter of law, notify an employer of an employee's disability, TxDOT claims. It argues also that an employee on medical leave is "unqualified," and not entitled to the ADA's protections. TxDOT's arguments are unfounded in law, eviscerate the ADA's purpose, and leave most vulnerable the very workers it intends to protect.

Third, and finally, even addressing TxDOT's proffered reasons for termination, Lara presented adequate evidence raising a fact issue that TxDOT's reasons for Lara's firing were pretextual. As such, this Court should affirm.

STANDARD OF REVIEW

A. Employment Claims Under Chapter 21

Chapter 21 of the Texas Labor Code is a comprehensive state anti-discrimination statute. TEX. LAB. CODE §§21.001-21.306. Chapter 21 prohibits discrimination on the basis of disability, as well as race, color, sex, religion, national origin, and age. TEX. LAB. CODE § 21.051. One of the purposes of Chapter 21 is to "provide for the execution of the policies embodied in Title I of the Americans with Disabilities Act of 1990 and its subsequent amendments (42 U.S.C. Section 12101 et seq.)." TEX. LABOR CODE § 21.001(3).

Because Chapter 21 is based on federal anti-discrimination laws, Texas courts look to federal law when interpreting Chapter 21. *See, e.g., Willi v. Am. Airlines, Inc.*, 288 Fed. Appx. 126, 127 n.2 (5th Cir. 2008) ("Because the ADA and [Chapter 21] are very similar, Texas courts and this Court focus on federal precedent regarding the ADA in interpreting [Chapter 21]"); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001).

B. Summary Judgment

The party moving for summary judgment has the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. *M.D. Anderson Hospt. & Tumor Institute v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). The nonmovant has no burden to respond to a traditional summary judgment motion unless the movant conclusively establishes its cause of action or defense. *Id.,* at 23. When reviewing a traditional or no-evidence motion for summary judgment, the trial court: (1) takes the nonmovant's evidence as true, (2) indulges every reasonable inference in favor of the nonmovant, and (3) resolves all doubts in favor of the nonmovant. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

C. Plea to the Jurisdiction

Governmental units may be sued when the Legislature expressly waives immunity from suit. *See State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009). The Legislature has waived governmental units' immunity from suit under Chapter 21 of the Texas Labor Code, by including state agencies within the statutory definition of "employers" under Chapter 21, and by providing that after administrative remedies are exhausted, "the complainant may bring a civil action against the respondent." TEX. LAB.

CODE §§ 21.002(8)(d), 21.254; *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008).

When the plea to the jurisdiction involves the merits of the case, the trial court must review the evidence to determine whether a fact issue exists. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). This standard of review mirrors the traditional summary-judgment procedure under Rule 166a(c) of the Texas Rules of Civil Procedure. *Id.*, at 228. If the evidence creates a fact question about the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the jury will resolve the fact issues. *Id.* at 227-28.

ARGUMENT AND AUTHORITIES

I. LARA ESTABLISHED A FACT ISSUE ON HIS PRIMA FACIE CASE OF FAILURE TO ACCOMMODATE.

An employer that fails to make "reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability" violates the anti-discrimination provisions of both the ADA and Chapter 21. 42 U.S.C. § 12112(b)(5); TEX. LAB. CODE § 21.128. To establish a prima facie case of failure to accommodate, Lara must simply raise a fact issue that (1) he is a qualified individual with a disability; (2) the disability and its consequential limitations were known

by his employer; and (3) the employer failed to make reasonable accommodations for the known limitations. *Feist v. La. Dep't of Justice, Office of the Attorney Gen.*, 730 F.3d 450, 452 (5th Cir. 2013).

First, Lara presented evidence establishing that he is a qualified individual with a disability as he requested leave—a reasonable accommodation—which would enable him to return and perform his job functions in the future.[2] Second, TxDOT knew of Lara's disability and consequential limitations. And third, TxDOT failed to make reasonable accommodations and instead fired Lara.

A. Lara is a qualified individual with a disability.

Medical leave constitutes a reasonable accommodation. And so when medical leave would enable the employee to return to work in the future, the employee is qualified under the ADA. The evidence that both Lara and his medical provider requested medical leave as a reasonable accommodation, to allow Lara to return to work in the future, satisfied this element. TxDOT's arguments to the contrary eviscerate the purpose of the law and this Court should reject them.

[2] Appellant, TxDOT, does not challenge that Lara had a disability, just that he was qualified. *See, e.g.*, *Appellant's Brief*, p. 25.

1. Leave constitutes a reasonable accommodation.

Leave constitutes a reasonable accommodation. *See, e.g., Garcia-Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 648-50 (1st Cir. 2000). Nearly every circuit has explicitly identified leave as a reasonable accommodation under the ADA. *See id*; *Graves v. Finch Pruyn & Co., Inc.*, 457 F.3d 181, 185 & n.5 (2nd Cir. 2006); *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 671 (3rd Cir. 1999); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995); *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781-83 (6th Cir. 1998); *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1049 n.3 (8th Cir. 1999); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999); *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 967 (10th Cir. 2002); *Holly v. Clairson Indus., LLC*, 492 F.3d 1247, 1263 (11th Cir. 2007); *Taylor v. Rice*, 451 F.3d 898, 910 (D.C. Cir. 2006).

Indeed, the EEOC identifies as possible reasonable accommodations "permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment." 29 C.F.R. Pt. 1630 App. § 1630.2(o). Likewise, Department of Labor regulations state that a reasonable accommodation may require an employer "to grant liberal

time off or leave without pay when paid sick leave is exhausted and when the disability is of a nature that it is likely to respond to treatment of hospitalization." 29 C.F.R. pt. 32, app. A(b).

As various courts have explained, permitting a leave of absence is a reasonable accommodation under the ADA because the accommodation "**at the present time would enable the employee to perform his essential job functions in the near future**." *Conoshenti v. Pub. Serv. Elec. & Gas Co.,* 364 F.3d 135, 151 (3rd Cir. 2004) (emph. added), citing *Criado v. IBM Corp.,* 145 F.3d 437, 444 (1st Cir. 1998) ("Criado offered evidence tending to show that her leave would be temporary and would allow her physician to design an effective treatment program."). In short, medical leave can constitute a reasonable accommodation.

2. An employee on medical leave as a reasonable accommodation is a "qualified individual."

An employee that requests medical leave that would allow him to return to work in the future is a qualified individual. *See, e.g. Bernhard v. Brown & Brown of Lehigh Valley, Inc*, 720 F. Supp. 2d 694 (E.D. Pa. 2010); *see also Miller v. Hersman*, 759 F. Supp. 2d 1 (D.D.C. 2011). TxDOT's contrary argument that "Lara was not qualified since he was unable to perform work of any kind" is wrong. *Appellant's Brief*, p. 12.

For example, in *Bernhard v. Brown & Brown of Lehigh Valley, Inc*, the court considered this very issue and rejected the same argument TxDOT makes here.[3] 720 F. Supp. 2d 694. In *Bernhard*, the employee took a medical leave of absence to undergo surgery. *Id.* at 697. Once the employee's FMLA leave expired, he requested another three months of leave and provided medical documentation stating that three months were necessary to recover. *Id.* The court found that a leave of absence for medical treatment may constitute a reasonable accommodation. *Id.* at 701.

The employer argued, like TxDOT, that the employee was "certified by his physician as being unable to perform any of the functions of his job," and therefore not legally qualified under the ADA and unable maintain a claim. *Id.* The court rejected this argument holding: "[i]t would be ***entirely against the import of the ADA*** if Mr. Bernhard were not considered qualified because he was not able to perform his essential job functions during his leave, ***as leave itself was the accommodation requested by Mr. Bernhard.***"). *Id.* (emph. added).

[3] Despite significant discussion of *Bernhard* at the trial court, TxDOT makes no attempt to address its holding on appeal.

Similarly, in *Miller v. Hersman*, the court explicitly rejected the theory TxDOT argues here.[4] 759 F. Supp. 2d 1. The employer argued that because the employee was unable to perform work during a six month leave of absence (the reasonable accommodation), the employee was unqualified as a matter of law. *Id.* at *34-*35. The court made short work of this claim, holding:

> Under Defendant's interpretation, an employee seeking a medical leave of absence would rarely be deemed a qualified employee under the Rehabilitation Act. ***As the caselaw upholding leaves of absence as reasonable accommodations makes clear, this is not the law***.

[4] While the statute in *Miller* involved the Rehabilitation Act, the analysis and holding remain relevant because of the Rehabilitation Act's relationship to the ADA and, by extension, Chapter 21. The ADA is based in part on section 504 of the Rehabilitation Act. *See* EEOC Compliance Manual, Policy Guidance: Provisions of the Americans With Disabilities Act of 1990: Summary of the Act and Responsibilities of the EEOC in Enforcing the Act's Prohibitions Against Discrimination in Employment on the Basis of Disability § 902 App., CCH P6901, p. 5345; *see also Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 676 (5th Cir. 2004) (noting the remedies, procedures, and rights available under Title II of the ADA are those rights which are available under § 504 of the Rehabilitation Act). Further, the ADA provides that its standards are not lesser than those applicable under the Rehabilitation Act. 42 U.S.C. § 12201(a); *see Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998). Accordingly, both courts and the EEOC have recognized that Rehabilitation Act cases generally have precedential value in ADA cases. *See Bragdon,* 118 S. Ct. at 2208; *Bridges v. City of Bossier*, 92 F.3d 329, 334 n.7 (5th Cir. 1996);*Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 192 n.4 (5th Cir. 1996).

Id. (emph. added), citing *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d at 1247; *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996).

The proper question the *Miller* court noted is whether the employee's "proposed leave of absence" could have "sufficiently improved" his condition that he would be "capable of returning to his position." *Id.* at 35. In *Miller*, the employee presented evidence that his medical leave for over six months would enable him to perform his job functions once he returned to work. *Id.* at *36.

The court held that this evidence raised a fact issue and defeated the employer's summary judgment. *Id.* at *36; *see also Shannon v. City of Philadelphia*, No. 98-5277, 1999 U.S. Dist. LEXIS 18089, 1999 WL 1065210, at *6 (E.D. Pa. Nov. 23, 1999) (holding fact issue existed on employee's request for three months unpaid leave for medical treatment as a reasonable accommodation). Plainly, an employee on medical leave as a reasonable accommodation is qualified.

TxDOT also argues, by extension, that that Lara was unqualified because he could not fulfill the "regular attendance" requirement of his job. *Appellant's Brief*, p. 14. Again, TxDOT's claim ignores the relevant

inquiry. *See Miller* 759 F. Supp. 2d 1 at *35; *see also Shannon*, 1999 U.S. Dist. LEXIS 18089, at *6 (". . . where a leave from work is at issue, whether attendance is an essential function of a particular job is not the relevant inquiry . . ."); *see also Bernhard*. 720 F. Supp. 2d at 701.

In sum, the law is straightforward. An employee that requests medical leave, as a reasonable accommodation, that would allow him to return to work in the future, is a qualified individual. TxDOT's arguments to the contrary are wrong.

3. Lara requested medical leave as a reasonable accommodation.

Both Lara and his medical provider requested medical leave as a reasonable accommodation to allow Lara to heal so that he could return to work. C.R. 436-437; 469-474; 391. The evidence shows:

- Lara communicated with TxDOT supervisors about his medical leave. C.R. 368-369.
- Lara spoke with his supervisor, Powell, about his job and medical condition in May 2015, and asked Powell about returning to work light duty because of his limitations. C.R. 436-437; 368
- Lara's medical provider sent paperwork informing TxDOT that Lara needed to heal before return to work and that Lara should be able to return to work without restrictions on October 21. C.R. 436-437; 469-474; 391; and

- TxDOT knew that the purpose of these forms was "to share medical facts and the amount of leave needed." C.R. 391; 413.

In short, Lara was recovering at home from surgery and requested a reasonable time to heal from surgery so that he could return to work. C.R. 436-437; 368-369; 469-474; 391. Both Lara and his physician provided TxDOT with updates on his condition and his anticipated return to work date. C.R. 436-37.

Lara presented adequate evidence that his medical leave would enable him to return and perform his job functions. Based on this evidence, the trial court properly denied TxDOT's motion as Lara presented evidence creating a fact issue that he was "qualified" for his position.

B. TxDOT knew of Lara's disability and consequential limitations.

Employers must make reasonable accommodations for ***known*** limitations. TxDOT knew of Lara's disability, limitations, and necessary accommodations. To avoid liability on these facts, TxDOT complains that the receipt of information from Lara's medical provider, rather than Lara, bars Lara's claim. TxDOT's argument is hollow and thwarts the very protections of the ADA.

1. Employers must make reasonable accommodations for known limitations.

Employers must make "reasonable accommodations to the ***known*** physical and mental limitations of an otherwise qualified individual with a disability." TEX. LAB. CODE §21.128 (emph. added). Informing the employer generally involves explaining that the needed adjustment in working conditions or duties relates to a medical condition; but it does not require mention of the ADA or use of the phrase "reasonable accommodation." *EEOC v. Chevron Phillips Chem. Co.,* LP, 570 F.3d 606, 621 (5th Cir. 2009). "Plain English will suffice." *Id.*

To this effect, an employee informing his employer of the need for an accommodation because of a disability is not the only way to trigger the employer's obligation to accommodate. When the disability is obvious or otherwise known to the employer, an employer's obligation to accommodate arises. *See Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2nd Cir. 2008); *EEOC v. Chevron*, 570 F.3d at 621 (no obligation for employee to request accommodation if the disability, resulting limitations, and necessary reasonable accommodations, are open, obvious, and apparent).

This view is "consistent with the statutory and regulatory language, which speaks of accommodating "known" disabilities, not just disabilities for which accommodation has been requested." *Brady*, 531 F.3d at 135. The *Brady* court went on to hold that "an employer has a duty reasonably to accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled." *Id.* Thus, the relevant inquiry is *what* TxDOT knew.

2. TxDOT knew of Lara's disability and limitations.

TxDOT knew about Lara's disability, resulting limitations, and suggested accommodation. C.R. 391; 413-414; 436-37; 469-474. As noted above, in May 2015 Lara spoke with his supervisor, Powell, about his job and his medical condition. C.R. 436. Lara asked Powell about returning to work on light duty, but Powell informed him no light duty work was available. *Id.* Lara and his physician provided TxDOT with updates on Lara's condition and his anticipated return to work date. C.R. 436-437.

Lara's physician, at Lara's request, faxed medical paperwork to TxDOT on July 15 **identifying the disability** (surgery to digestive system resulting in colostomy bag and large wounds), **resulting limitations**

(unable to perform essential functions of heavy lifting, straining, and stooping), **and reasonable accommodations** (wounds need to heal before return to work and Lara should be able to return to work without restrictions on Oct. 21). *Id.*, C.R. 469-474.[5] TxDOT knew that the purpose of these forms was "to share medical facts and the amount of leave needed." C.R. 391. TxDOT knew that through these forms Lara communicated a need for extended sick leave. C.R. 391.[6] There is ample evidence supporting this element.

3. TxDOT's complaint about receiving information from Lara's medical provider is baseless.

TxDOT argues that Lara fails in this element because "Lara did not personally request any accommodations." *Appellant's Brief*, p. 16. ***The law is not so obtuse to turn a blind eye simply because information about the disability did not come directly from the employee.***

Someone other than the employee can make a request for a reasonable accommodation on the employee's behalf. *See, e.g.*, EEOC Enforcement Guidance: *Reasonable Accommodation and Undue*

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[5] *See also,* FN 1, listing the forms completed by Lara and his medical provider.

[6] TxDOT concedes in its briefing that before terminating Lara, "TxDOT management met and discussed doctor's notes [and] the estimated return date . . ." *Appellant's Brief,* p. 22.

Hardship Under the Americans with Disabilities Act, Oct. 17, 2002,[7] ("[A] family member, friend, ***health professional***, or other representative may request a reasonable accommodation on behalf of an individual with a disability.") (emph. added).

The relevant inquiry is *what the employer knew*, *not who told the employer*. *See, e.g.*, *Brady*, 531 F.3d at 135. Ignoring this, TxDOT seeks to create a rule of law that a doctor's note, categorically, cannot trigger the employer's obligation to make reasonable accommodations. *Appellant's Brief*, p. 20. ***That is not the law.***

TxDOT's reliance on *Hester v. Williamson County* in support of this proposition proves this very point. *See Appellant's Brief*, p. 20 (Appellant argues "[a] doctor's note indicating a potential return date should not be considered an accommodation under the ADA"), citing No. A-12-CV-190-LY, 2013 WL 4482918, at *7 (W.D. Tex. Aug. 21, 2013). A cursory review of the facts shows that the case does not say what TxDOT wants it to say.

In *Hester* the employee's disability was diabetes. *Id* at *2. The issue was whether a doctor's note from a podiatrist, for foot surgery *unrelated to the employee's actual claimed disability* (diabetes) could constitute a

[7] *Available at* http://www.eeoc.gov/policy/docs/accommodation.html.

request for reasonable accommodation. *Id.* at *22-23 (noting there was no record that the foot surgery was an accommodation of his disability, diabetes). The rule, if any, of *Hester*, is that a doctor's note for something unrelated to the disability is not a reasonable request under the law.

To suggest that *Hester* bars Lara's claims on these facts is wrong. Lara's medical provider submitted TxDOT's own paperwork *specifically* identifying Lara's disability, resulting limitations, and suggested accommodations. C.R. 436-37; 469-474. TxDOT's interpretation ignores the actual law and strips the ADA of its protections. Applying the proper inquiry, Lara raised a fact issue, and the trial court's denial of Defendant's Motion was proper.

C. TxDOT failed to make reasonable accommodations for known limitations.

Lara requested medical leave as a reasonable accommodation. C.R. 435-437. Rather than make the reasonable accommodations for Lara's disability, TxDOT fired him. C.R. 392; 395; 422; 377. With these inescapable facts, TxDOT instead claims its failure was excused for various reasons.

First, TxDOT argues that Lara's requested leave was "not reasonable" as a matter of law. But, as the evidence demonstrates, the leave was not only reasonable, but mandated by TxDOT's own policies.

Second, TxDOT argues that Lara's medical leave was indefinite and therefore unreasonable. This argument, however, is unsupported in fact or law. The record is clear, Lara did not take indefinite leave, but had a return date of October 21.

Third, TxDOT argues that its prior accommodations absolve it of liability under the ADA. These arguments are misdirection. Lara's entitlement to leave under a sperate administrative code is distinct from TxDOT's violations of Chapter 21 and the ADA. Further, TxDOT's prior accommodations only reinforce the conclusion that TxDOT *knew* it had to make reasonable accommodations and *chose* not to do so.

1. Lara requested a reasonable accommodation.

As set forth above, leave can be a reasonable accommodation under the ADA. 29 C.F.R. Pt. 1630 App. § 1630.2(o) (permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment); 29 C.F.R. pt. 32, app. A(b); *see, e.g., Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d at 648-50.

TxDOT argues that the unpaid leave sought by Lara as an accommodation was unreasonable. But employers cannot simply call a leave request unreasonable or indefinite to escape liability under the ADA. *See, e.g., Bernhard*, 720 F. Supp. 2d at 701 (rejecting employer's argument that the employee's request for another three month leave of absence as a reasonable accommodation under the ADA, following the expiration of his FMLA leave, as "disingenuous[]" and "absurd"); *Reed v. Jefferson Parish Sch. Bd.*, 2014 WL 1978990, *3 (E.D. La. Apr. 24, 2014) (holding employee's request for another two weeks of leave following a six-month medical leave of absence constituted a request for a reasonable accommodation).

Nunes v. Wal-Mart Stores, Inc., is instructive to our case. 164 F.3d 1243. In *Nunes* the court held that a two-month extension of a seven-month leave may be a reasonable accommodation where the employee was receiving treatment and the employer's policies permitted employees to take unpaid leaves of up to one year. 164 F.3d 1243.

Nunes (like Lara) was a good employee who had received above average performance ratings. *Id.*, at 1247. As the court noted, Nunes went out on medical leave with the blessing of Wal-Mart, whose stated

benefits policy (like TxDOT) included unpaid medical leave of up to one year. *Id.*

Throughout the leave period, Nunes submitted doctors' certifications to Wal-Mart showing that she would be unable to work until November or December. *Id.* When she was terminated in October, she had been on medical leave for seven months and was receiving treatment for her illness. *Id.* The court found that Nunes raised a fact issue about whether her medical leave, projected to extend to November or December, was a reasonable accommodation. *Id.*

Here, TxDOT's own policies allow TxDOT employees to take up to one year of unpaid medical leave. C.R. 396-397; 446. TxDOT cannot argue with a straight face that extending Lara's leave for a five-week period is unreasonable when ***its own policies allow TxDOT employees to take up to one year of unpaid medical leave***. *Id.* In fact, when leave without pay is required as a reasonable accommodation for a disability, TxDOT's policy *mandates* TxDOT grant the unpaid medical leave. C.R. 396-397; 427. Thus, Lara presented evidence that he requested a reasonable accommodation.

2. Lara requested leave for a specific, not indefinite, time.

TxDOT argues that Lara's requested leave was "indefinite in nature" and not reasonable as a matter of law. *Appellant's Brief,* p. 21-22. This argument is unsupported in fact or law. The record is clear, Lara did not take indefinite leave. And, TxDOT's legal argument does not hold water.

a. TxDOT's argument is factually incorrect.

An employee that requests a specific amount of leave, carries his prima facie burden in its reasonable accommodation claim. *See, e.g. EEOC v. Accentcare Inc.*, No. 3:15-CV-3157-D, 2017 U.S. Dist. LEXIS 95922, at *18 (N.D. Tex. 2017). A request for specific, rather than indefinite, leave satisfies this burden. *Id.* ("A reasonable jury could find that [employee] informed [employer] of her disability and of its consequential limitations, and that [employer] terminated [employee's] employment rather than reasonably accommodate her known limitations").

Completing TxDOT's own paperwork, Lara's medical provider told TxDOT that Lara could return to work without restrictions on October 21. C.R. 473. TxDOT knew that Lara wanted TxDOT to hold his position for him until October 21, the date Lara's physician said that Lara

could return to work without restrictions. C.R. 391; 413-414; 436-37; 469-474.

Elizabeth Holick, lead HR specialist, knew from the medical paperwork that Lara was asking for medical leave and that Lara's doctor said Lara would be able to return to work on October 21. C.R. 414. Simmons knew the same. C.R. 395. Yet, with a return date just weeks away, TxDOT fired him anyway. As the evidence bears out, Lara's leave was not indefinite.

b. TxDOT's proposed rule of law does not exist.

TxDOT seeks to fashion a rule of law wherein a request for a *specific* amount of leave constitutes an unreasonable accommodation. *Appellant's Brief*, p. 15. To support this TxDOT relies on *Moss v. Harris Cty. Constable Precinct One*, to argue that where a doctor cannot release the employee to work for another month, the employee is "medically incapable of performing duties at the time of termination and not qualified." *Id.*, citing 851 F.3d 413, 415 (5th Cir. 2017). And yet, a cursory review of the facts again reveals that the case does not say what TxDOT wants it to say.

In *Moss*, the Fifth Circuit acknowledged that leave "whether paid or unpaid can be a reasonable accommodation . . ." *Id.* at 419. But in *Moss*, *the employee admitted that he was never going to return following medical leave*. *Id.* at 418-19 ("That is, Moss would take leave and never return. . ."). Instead the employee intended to retire on his anticipated return date. *Id.* In short, when an employee requests leave *with no intent of ever actually returning*, leave is not a reasonable accommodation. *Id.*

From these facts, TxDOT tries to wrest a rule of law somehow applicable to Lara. But, again, the facts of TxDOT's cited authority undermine its argument and reveal the weakness of its own position. Here, the record is clear that Lara requested a specific return date, after recovering from surgery. C.R. 436-437; 469-474. And Powell testified that Lara repeatedly conveyed that he wanted to remain an employee of TxDOT after his medical leave, entirely dissimilar from *Moss*. C.R. 370-371.

Once Lara put TxDOT on notice that he wanted assistance for his disability, TxDOT had an obligation to engage in the interactive process. *See Aspen v. Wilhelmsen Ships Serv.*, No. 13-6057, 2015 U.S. Dist. LEXIS 28849, at *25 (E.D. Pa. 2015). Instead, TxDOT "stymie[d] the

interactive process of identifying a reasonable accommodation" by "preemptively terminating" Lara. *See Cutrera v. Bd. of Supervisors*, 429 F.3d 108, 113 (5th Cir. 2005). Lara presented adequate evidence to establish a fact issue that his leave constituted a request for reasonable accommodation under the ADA. Thus, the trial court's denial of TxDOT's motion was proper.

3. TxDOT's arguments about prior accommodations are a misdirection.

TxDOT suggests throughout its brief that it is not liable because: (1) it made some accommodations before firing Lara and (2) those accommodations met basic minimum requirements under a separate administrative code. *Appellant's Brief*, p. 17. ("Since TxDOT granted the maximum amount of sick leave pool, Lara's claim . . . fails"). These arguments miss the mark.

TxDOT allowed leave for Lara's surgery and recovery in May and June. Yet, in September, just weeks from his return date, TxDOT did an about-face and fired Lara while he was still recovering. TxDOT's argument, in essence, is that because it waited four months, rather than firing Lara immediately, this Court should count that a point in its favor. *Not so.*

TxDOT's prior accommodations do not absolve its subsequent failure. This evidence only reinforces the conclusions that TxDOT *knew* of its obligation to provide reasonable accommodations—having done so twice before—*and chose not to do so*. TxDOT's failure departed from its own practice and its legal obligations.

TxDOT tries to create a misperception that meeting minimum requirements under an administrative code defeats liability under the ADA. But meeting basic requirements under a separate administrative code is wholly independent of whether TxDOT violated its obligation to make reasonable accommodations under Chapter 21 and the ADA. The argument is a red herring. To allow a "disability-neutral" policy, such as the administrative code, to trump the ADA would "utterly eviscerate" the statute's protections." *Holly v. Clairson Indus., L.L.C.*, 492 F.3d at1248. This Court should reject these arguments.

II. LARA ESTABLISHED A FACT ISSUE ON HIS PRIMA FACIE CASE OF DISABILITY DISCRIMINATION.

To establish a prima facie case of disability discrimination Lara must show (1) that he has a disability; (2) that he was qualified; and (3) that he was subject to an adverse employment decision on account of his disability. *EEOC v. LHC Grp., Inc.,* 773 F.3d 688, 697 (5th Cir. 2014);

Donaldson v. Tex. Dep't of Aging & Disability Servs., 495 S.W.3d 421, 436 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). TxDOT does not challenge this first element. And, Lara established that he was qualified above. Finally, the evidence creates a fact issue that TxDOT fired Lara because of his disability.

A. Lara has a disability.

TxDOT does not challenge this element of Plaintiff's claim on appeal. *Appellant's Brief*, p. 25. The record and briefing below establish Lara's disability.

B. Lara is qualified for his job.

Lara is a qualified individual with a disability. *See* Sec. I(A). Because Lara was recovering at home from surgery and had requested a reasonable time to recover, he was "qualified" for his position under Chapter 21. *See Bernhard*, 720 F. Supp. 2d at 70 (noting that to hold otherwise would be entirely against the import of the ADA); *see also Miller*, 759 F. Supp. 2d 1. As a result, Lara established a fact issue on the second element of his discrimination claim.

C. TxDOT fired Lara because of his disability.

To establish a prima facie case of disability discrimination the plaintiff must prove that he was subject to an adverse employment

decision on account of his disability. *EEOC v. LHC Grp., Inc.*, 773 F.3d at 695. Lara presented evidence raising a fact issue on this point.

Lance Simmons, the District Engineer, decided to fire Lara. C.R. 392. Simmons made this decision because Lara was unable to come to work and perform his duties "due to [Lara's] limitations" as set forth in his medical paperwork and that "[Lara] was recovering." C.R. 393. The September 9 Letter confirms that TxDOT fired Lara on account of his disability. C.R. 442. In terminating Lara, Simmons references Lara's medical paperwork, and the fact he could return to work on October 21. *Id.*

The evidence creates a fact issue that TxDOT fired Lara on account of his disability. *See Donaldson*, 495 S.W.3d at 436. Therefore, the trial court's denial of TxDOT's Motion is proper.

III. LARA ESTABLISHED A FACT ISSUE ON HIS PRIMA FACIE CASE OF RETALIATION.

To make a prima facie case of retaliation Lara must simply raise a fact issue that (1) he engaged in protected activity, (2) TxDOT took an adverse employment action, and (3) there is a causal link between the protected activity and the adverse employment action. *See Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 531 (5th Cir. 2003); *Martin v. UT*

Southwestern Med. Ctr., 2009 U.S. Dist. LEXIS 1691, *34-35 (N.D. Tex. Jan. 12, 2009). Lara satisfies these three elements.

First, Lara engaged in a protected activity by requesting a reasonable accommodation. Second, TxDOT fired Lara. And third, the proximity of Lara's request for reasonable accommodation and termination raises an inference of a causal link and creates a fact issue on this element.

A. Lara engaged in a protected activity.

A request for accommodation may constitute "protected activity" supporting a retaliation claim. *Foster v. Mt. Coal Co., LLC*, 830 F.3d 1178, 1188 (10th Cir. 2016); *Tex. State Univ. v. Quinn*, No. 03-16-00548-CV, 2017 Tex. App. LEXIS 11025, at *6 (Tex. App.—Austin Nov. 29, 2017, no pet. h.) (holding accommodation request to supervisor was protected activity in support of plaintiff's retaliation claim under Chapter 21). *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 16 (1st Cir. 1997).

Lara engaged in protected activity at least three times by seeking reasonable accommodations for his disability. First, he requested the accommodation of light duty in mid-May 2015, which his supervisor summarily dismissed. C.R. 436-437. Second, Lara's physician, at Lara's

request, faxed medical paperwork to TxDOT on July 15 requesting leave from work until October 21, for Lara to heal from surgery. C.R. 436-437; 469-474; 391.

Third, on August 18 Lara sought assistance from TxDOT relating to his medical condition and limitations, and asked what he needed to do to keep his job. C.R. 369-370. Talafuse, with whom Lara spoke, relayed this conversation to Supervisor Brad Powell who e-mailed Lance Simmons on August 19 stating that Lara was asking about his future with TxDOT. *Id.* As Powell testified, Lara was worried about his job and wanted to remain an employee of TxDOT. C.R. 369-371. In short, there is ample evidence on this element, and Lara carried his burden.

B. TxDOT took adverse employment action against Lara.

TxDOT does not dispute that it fired Lara.

C. A causal link exists between Lara's request for reasonable accommodation and his firing.

To establish a causal link for a prima facie case Lara need not prove that his protected activity was the sole factor motivating TxDOT's adverse employment action. *See Mauder v. Metropolitan Transit Auth.*, 446 F.3d 574, 583 (5th Cir. 2006). Instead, the evidence must show that TxDOT's decision to take adverse action was based in part on knowledge

of Lara's protected activity; and, at this point, the evidence must simply create a fact issue. *See Medina v. Ramsey Steel Company*, 238 F.3d 674, 684 (5th Cir. 2001).

Lara can satisfy the "causal link" element by showing that the adverse decision and his protected activity "were not wholly unrelated." *Id.* (quoting *Simmons v. Camden County Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir. 1985)). To this effect, close timing between an employee's protected activity and an adverse action against him may provide the causal connection required to make out a prima facie case of retaliation. *Evans v. Houston*, 246 F.3d 344, 354 (5th Cir. 2001); *Richard v. Cingular Wireless LLC*, 233 Fed. Appx. 334, 338 (5th Cir. 2007) (concluding that two-and-one-half months is a short enough period to support an inference of a causal link); *Jones v. Robinson Property Group, L.P.*, 427 F.3d 987, 995 (5th Cir. 2005) (finding that a period of less than sixty days was sufficiently close to establish causal link for prima facie case of retaliation).

Lara requested assistance with his disability on August 18. ***Just fourteen days later*** TxDOT decided to fire him. C.R. 437; 442; 467-475. This decision came less than ***fifty days*** after Lara's physician

communicated Lara's disability, resulting limitations, and suggested accommodation to TxDOT. C.R. Exhibit 6. C.R 437; 442; 467-475.

This close timing supports an inference of a causal link and raises a fact issue on this element. Because of the proximity, and because the burden of establishing a prima facie case "is not onerous," the evidence of short window of time meets the low threshold and is enough to raise a fact issue. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). As a result, the trial court properly denied TxDOT's Motion.

IV. LARA ESTABLISHED A FACT ISSUE THAT TXDOT'S PROFFERED REASON FOR LARA'S TERMINATION WAS PRETEXTUAL.

An employee defeats summary judgment by establishing a prima facie case of his claims. *Johnson v. City of Houston,* 203 S.W.3d 7, 12 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). In response, the employer must produce evidence of a legitimate, non-pretextual, reason for the employment action. *Id.* If, but only if, the employer meets this burden, the employee must offer evidence that raises a fact issue about pretext. *Alamo Heights Indep. Sch. Dist. v. Clark,* No. 16-0244, 2018 Tex. LEXIS 271, at *45-*46 (Apr. 6, 2018).

As the Supreme Court of Texas recently held, this same framework applies to pleas to the jurisdiction. *Alamo Heights Indep. Sch. Dist.*, 2018

Tex. LEXIS 271. As the Court also noted, "[i]f the jurisdictional evidence does not negate or rebut the prima facie case, the ensuing aspects of the burden-shifting analysis are not implicated in the jurisdictional inquiry." *Id.* Lara's submits that the prima facie case is the only issue before this Court on appeal. And, even addressing TxDOT's proffered explanations, Lara presented adequate evidence raising a fact issue about pretext.

A. TxDOT fails to address how, if at all, it negated Lara's prima facie case.

TxDOT argues that this Court should dismiss Lara's claims because he failed to make out a prima facie case. *Appellant's Brief* p. 10 (challenging solely Lara's prima facie case). It does not argue that it satisfied its burden of proving a legitimate reason for firing Lara. TxDOT fails to address how, if at all, it met its burden of proving a legitimate, nondiscriminatory reason for termination.

Because TxDOT failed to show how the evidence negates or rebuts Lara's prima facie showing "the ensuing aspects of the burden-shifting analysis are not implicated in the jurisdictional inquiry." *Alamo Heights Indep. Sch. Dist.*, 2018 Tex. LEXIS 271, at *45-46. Accordingly, Lara submits that the *only* issue here is Lara's prima facie case.

B. Lara presented evidence raising a fact issue about pretext.

Even engaging in the burden-shifting analysis, Lara offered evidence raising a fact issue about pretext in various ways. Lara presented evidence that (1) TxDOT violated its own policies; (2) TxDOT's proffered explanation was false and unworthy of credence; and (3) TxDOT gave shifting and inconsistent explanations for Lara's termination. Each of these is sufficient to raise a fact issue about pretext.

1. TxDOT failed to follow its own policies in firing Lara.

An employer's failure to follow its usual policy and procedures in carrying out the challenged employment actions may serve as evidence of discrimination. *Stillwell v. Halff Assocs.*, No. 05-12-01654-CV, 2014 Tex. App. LEXIS 7646, at *16 (App.—Dallas July 15, 2014). Here, TxDOT failed to follow its LWOP (leave without pay) policy, reasonable accommodation policy, and policy on modified and light duty for Lara.

a. TxDOT violated its LWOP policy.

TxDOT failed to follow its LWOP policy for Lara. Under the LWOP policy, employees may request LWOP for up to 12 months for an illness or injury. Yet when the employee "requires LWOP as a reasonable accommodation for a disability" the decisionmaker **must** grant LWOP to the employee. C.R. 396-397; 446.

Brad Powell admitted that as Lara's supervisor he could have initiated a process to provide LWOP to Lara as a reasonable accommodation. C.R. 374. Lance Simmons admitted that placing Lara on LWOP would have been an option. C.R. 396. Simmons agreed that if an employee has a disability he must grant LWOP to the employee as a reasonable accommodation. C.R. 396-397. But Simmons did not grant LWOP to Lara; he fired him instead. *Id.* These actions violate TxDOT's own LWOP policy and provide an inference of discrimination.

b. TxDOT violated its reasonable accommodation policy.

TxDOT failed to adhere to its policy for accommodating individuals with disabilities. Under this policy, TxDOT supervisors initiate the process of identifying the need for reasonable accommodation when "they become aware of an employee with a disability and the possible need for an accommodation." C.R. 439-440; 444; 457; 373. Lara's supervisor, Brad Powell, knew that Lara had major surgery in May 2015 resulting in a disability and lost time from work. C.R. 373-374; 439-440; 442; 444.

Powell knew that Lara needed off work until his return on October 21. C.R. 373-374. With this information, Powell did nothing. *Id.* He did not initiate a process to provide any sort of accommodation to Lara. *Id.*

Further, Lance Simmons, who decided to fire Lara, knew about Lara's medical condition and return to work date. 394-395. And, yet, did nothing to initiate communications with Lara about an accommodation for Lara. C.R. 394-395. In short, TxDOT's violation of its own reasonable accommodation policy raises a fact issue about pretext.

c. TxDOT violated its modified/light duty policy.

TxDOT maintains a temporary modified duty policy to allow employees to return "to their regular positions with modified duties." C.R. 436-437. In May 2015, Lara spoke to his supervisor about his job and his medical condition and asked about returning to work on light duty. *Id.* Powell informed Lara no light duty was available. *Id.*; C.R. 368. Instead, Powell said TxDOT wanted Lara released to 100% full duty before returning to work. C.R. 436-437. TxDOT echoed this statement later in the termination letter to Lara where it said that before reapplying Lara must "obtain clearance from your physician to return to a full duty status," C.R. 439-440; 442.

These statements violated the temporary modified duty policy by failing to allow Lara to return to work with modified duties. These statements also violate the law. *See, e.g., Steffen v. Donahoe*, 680 F.3d 738, 748 (7th Cir. 2012) ("Since a '100% healed' policy prevents individual

assessment, it necessarily operates to exclude disabled people that are qualified to work, which constitutes a per se violation."); *Henderson v. Ardco, Inc.*, 247 F.3d 645, 653 (6th Cir. 2001) ("[A] 100% rule is impermissible as to a disabled person."). These statements, violating TxDOT's own policies and the law, create a fact issue of pretext.

2. TxDOT gave shifting and inconsistent explanations for termination.

A court may infer pretext when a defendant has provided inconsistent or conflicting explanations for the challenged conduct. *See Nasti v. CIBA Specialty Chem. Corp.*, 492 F.3d 589, 594 (5th Cir. 2007); *Aust v. Conroe Indep. Sch. Dist.*, 153 S.W.3d 222 (Tex. App.—Beaumont 2004, no pet.) (shifting explanations given by employer for its decision to terminate the plaintiff established a fact issue over whether unlawful discrimination motivated its decision); *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 235-36 (5th Cir. 2015) (reversing summary judgment for employer in discrimination case in which two company witnesses gave different and shifting reasons for the decision to terminate the plaintiff).

TxDOT has provided inconsistent explanations for Lara's termination. TxDOT asserted that "business needs" required Lara's

termination, but later claimed that Lara's potential need for future medical treatment factored into its decision to terminate. *See, e.g.* C.R. 169-170. TxDOT acknowledges that Lara's potential need for a future colostomy takedown surgery factored into TxDOT decision to fire him. *Id.*

And yet, Lance Simmons, the decisionmaker, testified that the September 9 termination letter states the only reasons for terminating Lara. C.R. 399. The termination letter references the business needs of the district and Lara's anticipated return to work on the date of October 21 as reasons for the decision to terminate but makes no reference to the future colostomy takedown surgery. C.R. 439-440; 442. And when asked in discovery to state under oath the reason TxDOT ended Lara's employment, TxDOT did not mention a word about the future takedown surgery. C.R. 439-440; 493.

Notably, at no point during any of Lara's conversations from May to September 2015 with folks in the Milam County office was Lara ever told that his absence was causing problems or that work was not getting covered. C.R. 437. It was only after TxDOT decided to fire Lara that it mentioned, for the first time to Lara, this excuse. *Id.* TxDOT's shifting

and inconsistent explanations for Lara's termination create a fact issue about pretext.

3. The evidence raises a fact issue that TxDOT's proffered explanation was false and unworthy of credence.

"Evidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's prima facie case, is likely to support an inference of discrimination even without further evidence of defendant's true motive." *Haire v. Bd. of Supervisors of La. State Univ.*, 719 F.3d 356, 365 n.10 (5th Cir. 2013).

TxDOT claimed in its letter to Lara that "[i]n order to meet the business needs of our district, it has become necessary to hire a full-time employee to perform your job." C.R. 439-440; 442. In short, TxDOT argues that Lara's absence from September 16 until October 21 was an undue burden on this massive state agency. The evidence casts serious doubts about TxDOT's excuse.

a. Many employees can share the inspector duties in the Milam County office.

While there were many options available to TxDOT to cover Lara's responsibilities during his absence, TxDOT did not pursue any of them. Several employees performed inspector-related work in August 2015. 439-440; 479-486. In the Milam County office there were several

employees capable of performing inspections, including two area inspectors stationed in the Milam County office who could assist on inspection duties in there. C.R. 436.

Despite all of these options, TxDOT supervisor Brad Powell testified that he never inquired whether employees, such as David Rinn, could help perform contract inspection duties during Lara's absence. C.R. 376. And before making the decision to terminate Lara's employment, District Engineer Lance Simmons did not even look to see if there was any other employee that could cover duties in the Cameron office while Lara was on leave. C.R. 377.

In short, TxDOT had numerous options available to it to cover Lara's work but did not deem it necessary to pursue any of them. The evidence casts serious doubt on TxDOT's claim that Lara's termination was necessary to "meet the business needs of the district."

b. <u>TxDOT inspectors in other offices could help cover Lara's duties</u>.

Despite the availability of numerous other inspectors, TxDOT did nothing to try and share Lara's job responsibilities among its many employees. TxDOT is a massive state agency with over 11,000 employees.

C.R. 435-437. Lara presented ample evidence that TxDOT had numerous inspectors that could have covered Lara's duties, including:

- The Milam County office had about 20 inspectors; *Id.*
- TxDOT offices near Cameron (Hearne, Caldwell, and Brenham), each had roughly two to three inspectors; *Id.*
- It was common for inspectors to go outside their own areas and assist inspectors in other offices with their workload; *Id.*
- On one occasion where an inspector with cancer was out for six to eight months, TxDOT sent Lara and other area inspectors help cover the workload. *Id.*

Lara's supervisor, Brad Powell, has sent employees to other offices to assist with jobs. C.R. 369. He admitted he could have requested assistance from other offices within Bryan District. *Id.* Lance Simmons testified that inspectors can float around and assist other offices when the need arises. C.R. 399-400. Despite the availability of other inspectors, TxDOT did nothing to try to share Lara's job responsibilities among its many employees. The evidence casts serious doubt on TxDOT's claim that that it needed to replace Lara and raises a fact issue that the explanation is false and unworthy of credence.

c. <u>TxDOT's own conduct caused the alleged strain, if any, not Lara's absence</u>.

TxDOT claimed that there were not enough employees because a member of the road crew was mainly covering Lara's inspection duties.

C.R. 141. But missing *one* person on the road crew does not create an undue burden. During the routine course of things, there was always turnover, and, in those instances, the remaining crew members would cover that work. C.R. 376.

The evidence raises serious questions that 'staffing shortages' were a legitimate concern when the TxDOT supervisor approved the transfer of technicians to other districts and failed to timely fill openings during the exact same time. C.R. 439-440; 454-460; 510; 141. TxDOT cannot show an undue burden because of staffing problems when its own actions caused the alleged problem. *See, e.g., Meachem v. Memphis Light, Gas & Water Div.*, 119 F. Supp. 3d 807, 818 (W.D. Tenn. 2015) (finding insufficient evidence to rule as a matter of law that Defendant would suffer an undue hardship because the alleged staffing burden only existed because of employer's actions).

The suspicious timing together with other evidence of pretext is sufficient to survive summary judgment. *Evans v. Houston*, 246 F.3d at 356. Lara presented ample evidence showing: (1) TxDOT's violation its own policies; (2) its shifting and inconsistent explanations; and (3) the

dubious assertion about "business needs," where the evidence showed that TxDOT had substantial labor at its disposal, which it did not use.

Lara has established a fact issue that TxDOT's proffered reason for termination is a pretext for unlawful discrimination. Thus, this Court should affirm the trial court's order.

CONCLUSION AND PRAYER

Lara established a fact issue on the prima facie elements of his failure to accommodate, disability discrimination, and retaliation claims. As such, the trial court properly denied TxDOT's Plea to the Jurisdiction and the fact-finder must address the issues. For these reasons, Appellee ask this Court to affirm the trial court's decision denying TxDOT's Plea to the Jurisdiction and for such further relief, in law or in equity, to which Appellee may be justly entitled.

Respectfully submitted,

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RULE 9.4(i) CERTIFICATION

In compliance with the Texas Rules of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 9,885.

/s/ Tyler Talbert
Tyler Talbert

CERTIFICATE OF SERVICE

I certify that a copy of Appellee's Brief was served by means of delivering it to the following by electronic service:

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